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No. _____

In The
Supreme Court of the United States

GERALD L. BROWN,
Petitioner,

v.

KHELLEH KONTEH, WARDEN,
TOLEDO CORRECTIONAL INSTITUTION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether or not in state prisoner habeas litigation involving sufficiency of the evidence issues the deference due to a state court's determination of the facts is a near absolute yielding of opinion deference standard that does not look beyond the facts found by the state court of appeals, or whether it is more of a courteous regard or respect deference standard that requires a more cautious approach to preserving the integrity of a defendant's constitutional right to due process, and reviews the entire trial court record to determine if the state court of appeals' determination of the facts was reasonable based upon all the facts presented at trial.

II.

Whether or not a defendant's federal due process rights to a fair trial and to be convicted only upon sufficient evidence are violated by removing the requirement to prove specific intent to kill in aggravated murder prosecutions in Ohio.

III.

Whether or not a defendant's federal due process rights to a fair trial and to be convicted only upon sufficient evidence are violated by a stacking of inferences in order to prove the identity of an aggravated murder suspect and to impute specific intent to kill to an alleged aider and abetter in Ohio aggravated murder prosecutions.

IV.

Whether the Sixth Circuit's Opinion misinterprets the strictures of 28 U.S.C. §2254(d)(2), and improperly

creates a "super" deference standard that functionally abandons meaningful federal review of state prisoner habeas questions of whether or not determinations of fact were reasonable based on all the evidence presented at the trial court, in favor of relying only on the factual determinations made by state courts of appeal, without looking behind those findings to the entire trial court record to judge whether or not they were reasonable.

V.

Whether it is a violation of defendant's federal due process right to a fair trial to convict him under Ohio's robbery Statute, due to a violation of Ohio's burglary statute, when the violation of the later does not involve the violation of the former and when a defendant was indicted in a manner the prohibits such a conviction.

VI.

Whether the Sixth Circuit also relinquished virtually all power to judge if the state court's determination of the facts on petitioner's culpability for any gun specifications, attempted murder counts and for all counts of aggravated robbery were reasonable based on all the evidence presented at trial, in violation of U.S. Supreme Court precedent and 28 U.S.C. §2254.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Sixth Circuit Court of Appeals upheld the district court's denial of Gerald Brown's petition for a writ of habeas corpus on June 2, 2009 under case numbers 06-4037/06-4043, but reversed and remanded to the district court for the resolution of an issue that does not materially alter Brown's state sentence of imprisonment. (Appendix A). The district court denied granting Brown's petition challenging the majority of his state convictions that resulted in a prison sentence of LIFE with no consideration of parole for 69 Years. (Appendices B & C). Petitioner has not yet returned to the district court, pending this appeal. Petitioner filed a petition for panel rehearing that was denied on August 7, 2009. (Appendix D).

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the 6th Circuit entered on June 2, 2009 denying a grant of a writ of habeas corpus to overturn his state convictions for, *inter alia*, aggravated murder and aggravated robbery with gun specifications. The ninety-day time period for seeking review of the judgement by this Court commenced on August 8, 2009, the day after the court of appeals denied Petitioner's request for panel rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution; Section 1.:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254(d) states that a writ of habeas corpus may not be issued unless the state court proceedings:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

STATEMENT

Introduction –

This Court has not decisively dealt with the issue of how much deference a habeas court must give a state court's determination of the facts, based on the record presented at trial. The Fifth Circuit was one of the first courts to address this issue stating that even though federal courts are required to show high measure of deference therein, this deference is not absolute. Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997). In Rice v. Collins,546 U.S. 333, 339, 126 S.Ct. 969 (2006), citing, Miller-El v. Dretke,545 U.S. 231, 240-241, 125 S.Ct. 2317 (2005) which in turn quoted Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029(2003), this Court noted that "the standard is demanding but not insatiable. . . 'deference does not by definition preclude relief.'" Beyond these indefinite descriptions, the Court has given little instruction as to what constitutes the appropriate degree of "deference" and/or how to identify when a lower court goes "too far" in giving deference to state court determinations of fact and fails to issue a writ, when all the facts presented in the trial court record would

otherwise convince a reasonable jurist that the state court's determination of facts was unreasonable.

Moreover, federal habeas courts need to know how a petitioner otherwise procures clear and convincing evidence of an unreasonable determination of the facts, beyond pointing to a lack of those facts in the record or by pointing out how key facts determined by the state court were based upon the impermissible stacking of inferences in its decision(s). In other words does 28 U.S.C. §2254(d)(2) and U.S. Supreme Court case law really require the Petitioner to "prove a negative?"

Petitioner respectfully states that the Court should resolve that a showing by clear and convincing evidence of an unreasonable determination of the facts, is achieved by highlighting the dearth of evidence in the record and/or by clearly rebutting the state court's determinations of facts in context of all the evidence presented at trial. The Court should also resolve that impermissible stacking of inferences by the state court constitutes clear and convincing evidence of an unreasonable determination of facts, especially when addressing the issue of sufficiency of the evidence.

In the context of sufficiency of the evidence, the Seventh Circuit concluded more than ten years ago that all a post-AEDPA court needs is to see that the lower state court otherwise did its best to resolve the case. In Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir.1997), vacated on other grounds sub nom. Gomez v. DeTella, 522 U.S. 801 (1997)the court of appeals stated:

> Because Jackson claims are mixed questions of law and fact ..., a writ of habeas corpus may be

> issued for evidence insufficiency only if state courts have unreasonably applied the Jackson standard. Federal review of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good-faith decision making when applying Jackson's 'no rational trier of fact' test.... [Section] 2254 'requires federal courts to take into account the care with which the state court considered the subject.... A responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment.' Id.

Now is the time for the Court to state that deference does not mean almost or absolute deference. And, when there is a wholesale absence of evidence of guilt, as in this case, no amount of deference can prevent the issuing of a writ, no matter how earnestly the state court appears to have applied itself or otherwise provided a proper forum for the resolution of the defendant's claims.

Sufficiency of the evidence involves a mixed question of law and fact. Therefore, the state court determination of facts should be given a lesser degree of deference by a federal habeas court and/or require the habeas court to review all the facts presented at trial, not just those employed by a state court of appeals in its written decision upholding a sufficiency determination, to ensure that deference is justified. Most important, federal habeas courts must actively recognize that the facts presented at trial are not only the facts stated in the state court of appeals decision, but are *all* the relevant facts presented in the trial court record.

Case and Facts –

Who killed John Hill? In spite of the lower court's refusal to grant a writ, the question remains unanswered. It is the question asked by one of the panel members at oral argument, whom added that this was one of the weaker cases for sufficiency he had ever seen. The State of Ohio never answered that question, nor does the court of appeals Opinion.

John Hill, a recent parolee, was shot to death in the early morning hours in his apartment bedroom. Exactly when he was shot is unknown. What is known is that the night before or in those early morning hours, he was in a fight with one or two other men who were with Brown. There was no testimony as to who shot Hill, or why he was shot. Jeramie Hill, John's brother was in the same fight, beaten up and knocked unconscious. Unlike Jeramie, John was *not* badly beaten before his death. (Opinion, pg. 7, Appendix A, pg. 13a).

The state court of appeals said the killing occurred while Brown was committing, attempting to commit, or fleeing immediately thereafter, an aggravated burglary/aggravated robbery and was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons.(J.A. Vol. 1, pg. 115).

The state court of appeals unreasonably concluded that there was sufficient evidence to show Petitioner aided and abetted in an act of aggravated murder. In reaching that flawed conclusion, the state court of appeals made unreasonable assumptions of fact, stacked inferences and made unreasonable and

contrary applications of United States Supreme Court case law.

The Sixth Circuit repeated the errors of the state court of appeals and the district court in its review and analysis of the facts and evidence of this case. The Sixth Circuit also failed to recognize or address arguments Brown made regarding several gun specifications. On page 25 of the panel's Opinion (Appendix A, pg. 42a), the lower court claims Brown either did not adequately address, or address at all, the gun specifications in Counts 1, 4, 5 and 9 of his indictment and therefore would not discuss them. Counts 1 and 5 alleged aggravated burglary of the Grant and Hill Apartments and Counts 4 and 9 were the felonious assault allegations on Grant and Jeramie Hill. Brown did address all of these counts and stated affirmatively that there was insufficient evidence to convict him. He did so on pages 28 and 33 of his merit appeal brief to the Sixth Circuit. On Page 28 he stated: "There was no evidence presented that a gun was used in the commission of, or to facilitate, the *assault*, robbery or *burglary* in Grant's apartment." (Emphasis added). This covers Counts 1 and 4 dealing with the alleged burglary and felonious assault of Grant. Also, on page 33 Brown stated:

> Similarly, there was no evidence presented that Appellant knew anyone he was with was armed with a gun. And finally, there was no testimony that Appellant was in the Hill apartment when a gun was drawn and used. Therefore, there was insufficient evidence to show that Appellant was guilty as an aider or abetter of using a gun in an aggravated robbery, or

> *burglary*, or for brandishing that weapon. (Emphasis Added).

Thus Brown objected to the sufficiency of the evidence regarding the gun specifications in Counts 5 and 9, alleging aggravated burglary of the Hill and Grant apartments and it is clear from the entire discussion from page 31-35 of Brown's federal merit appellate brief that he was objecting to any conclusion that he knew a gun was present during the fights, thereby further addressing Count 9 of the indictment.

In the state court of appeals decision (Respondent's Return of Writ Exhibit 19), the dissenting Judge wrote:

> [T]he evidence here does not put the gun used to kill [John] Hill in defendant's possession or in the possession of those with him at the time of the murder, and does not reflect that defendant knew of, assisted in, or cooperated in Hill's Murder . . . In the absence of a criminal conspiracy and because the evidence does not support a finding that the murder was necessary to carry out the desired end of the criminal activity in which defendant was engaged, the evidence in support of defendant's convictions for aggravated murder is insufficient.
>
> Without question, defendant engaged in egregious conduct the evening John Hill was murdered, and defendant appropriately is punished for that conduct. However, because the record lacks evidence to support defendant's involvement as an aider or abettor in Hill's

> murder, as required under R.C.2923.03, I, unlike the majority, conclude that the aggravated murder convictions, and the accompanying gun specifications, are not supported by sufficient evidence. (J.A. Vol. 1, pg. 297).

Gerald Brown Jr. accepted responsibility for his actions on the night in question and did not challenge his convictions for felonious assault and aggravated burglary by fighting in Hill's apartment, and another man's apartment, by the name of Emmit Grant (a drug dealer), in the same complex.

Brown had no significant criminal record and was twenty-years old at the time this incident occurred. His total sentence was **LIFE WITH NO CONSIDERATION FOR PAROLE FOR 69 YEARS.**

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision, Recommended for Full-Text Publication, has created a near absolute deference standard for determining the reasonableness of a State Court's Determination of the Facts based on its Review of the Trial Record, in contradiction to U.S. Supreme Court Case Law Precedent and the plain meaning of 28 U.S.C. §2254(d)(2).

In Brown's case, the Sixth Circuit created an unacceptably high degree of deference for state court determinations of fact. Its decision is recommended for full-text publication and will set a dangerous precedent, both binding and persuasive, for future courts, when faced with cases where the reviewing federal court strongly disagrees with the state court determination of facts, as the Sixth Circuit panel did here, especially when it is obvious that the state court of appeals engaged in the impermissible stacking of inferences and/or otherwise misapplied the facts present to the law. The Sixth Circuit concluded it was reasonable for the state court of appeals to put a "gloss" on its determination of the facts in Brown's case. (Opinion, pg. 24, Appendix A, pg. 40a). No amount of gloss should create facts where none exist. It should never be reasonable for a state court of appeals to put a gloss on any facts in a case. The rule of law demands the unvarnished truth. There was a dearth of evidence for, *inter alia*, a specific intent to kill. Therefore, the determination that sufficient facts existed to support such convictions was unreasonable.

The Anti-terrorism, Effective Death Penalty Act [AEDPA], under 28 U.S.C. §2254(d)(2), requires deference to the state court of appeals fact finding. Yet, the Brown Decision leads to the conclusion that: even if there is no evidence of presence during the killing, knowledge the killing was about to be committed, or aiding and abetting the killing, the federal habeas court still cannot grant a writ, as long as it appears the state court of appeals earnestly or "reasonably" stated the facts it found important in the trial court record.

There is nothing reasonable about convicting a man without sufficient evidence. Therefore, the Court needs to make clear for the lower habeas courts that in determining what is a reasonable interpretation of the facts based on the evidence presented at trial, the reviewing courts must look to all the relevant evidence presented at trial, not just the facts as stated in the state court of appeals decision. It must further state that the degree of deference owed a state court on issues of sufficiency of the evidence is not the highest degree of deference, but a more cautious degree of deference where the habeas court reviews all the relevant evidence presented at trial and as summarized in the state court of appeals decision, to ensure that the state court's determination of facts was indeed reasonable.

The Sixth Circuit's Opinion in this case will also further worsen the growing problem of federal habeas courts failing to exercise their power to grant the writ, when state courts have undoubtedly, due to human error, violated citizens' constitutional rights. This trend is reported in a 2007 study conducted through Vanderbilt University Law School. The study involved 2384 non-capital habeas cases that were randomly

selected from 37,000 non-capital state prisoner habeas filings in all federal district courts during the years 2003 to 2004. Of these cases 22% were dismissed as time barred, 7% were dismissed as successive petitions, 9.5% were dismissed due to failure to exhaust, and 13% were dismissed due to procedural default. The remaining 48.5%, or 1,156 cases, obtained merit review. Out of the 1,156 cases only 7 were granted a writ. Therefore, only .006% of all non-capital federal habeas petitions of state prisoners over a two year period were granted any relief upon merit review. Presumably, many of these merit review cases involved "deference" to the state court's determination of the facts. Prior to AEDPA the rate of relief for non-capital habeas filings was 1 in 100. Nancy J. King, Fred L. Cheesman II, Ph.D., Brian J. Ostrom, Ph.D., A Final Technical Report: Habeas Litigation in U.S. District Courts (An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996), August, 21, 2007, Vanderbilt University Law School, U.S. Department of Justice Document Number 219559, Award Number 2006-IJ-CX-0020.[1]

It cannot be assumed that state courts suddenly and dramatically stopped erring to the detriment of the rights of the accused, upon the passage of AEDPA in 1996. Although Congress clearly intended to speed up executions and limit the number of habeas petitions requiring merit review, the requirements outlined in 2254(d)(2) should not reduce the federal courts' ability to correct constitutional error relating to sufficiency of

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[1] Web Address: http://law.vanderbilt.edu/article-search/article-detail/index.aspx?nid=126.

the evidence. Sufficiency requirements help maintain the integrity of the adversarial process and ultimately guard against the abuse of power.

It is beyond reason to conclude that only .006% of almost half of the roughly 37,000 cases, granted merit review, warranted relief, for an unreasonable application of federal law or unreasonable determination of the facts based on the evidence presented at trial. There is a problem here.

The problem is that federal courts, at the behest of 28 U.S.C. §2254(d), have unnecessarily abdicated their concurrent authority over the States' guardianship of federal constitutional rights. This abdication is unhealthy for the public's respect for the rule of law and fails to provide any substantial check on state violations of federal constitutional rights. The writ is now functionally dead in non-capital cases.

The presumption of correctness that applies to the state court of appeal's determination of the facts under 28 U.S.C. §2254(e)(1) does not mean that Brown must prove his innocence to show by clear and convincing evidence that the determination of facts as to sufficient evidence were unreasonable. So, as suggested in 28 U.S.C. §2254(f), if there is no evidence in the trial transcript to show who killed the victim or that Brown was present during the killing, how else is a petitioner to show that the state's determination of the facts was unreasonable by clear and convincing evidence? In this case, the trial transcript shows there was insufficient evidence by the clear and convincing standard. The Sixth Circuit's decision here ignores this evidence and misunderstands that deference to the state court does

not mean accepting its version of the facts as found in its decision.

The Sixth Circuit's excessive deference to the state appellate court's fact finding, beyond that required by AEDPA, all but prohibits a district courts from reviewing the state trial court record in order to determine whether or not the state court of appeals determination of fact was unreasonable. (Opinion, pgs. 12-13, Appendix A, pgs. 23a-25a). It is axiomatic that a federal habeas court has the authority to review the state court record in order to make this determination.

Stated simply, the *evidence presented* is not what the state court of appeals includes in its decision, but is all the evidence presented at trial.

The habeas court is not required to strictly accept the statement of facts by the state court of appeals as correct. Yet, this is what the Opinion of the Sixth Circuit ultimately leads to. Congress would not have empowered the federal courts to grant the writ upon a finding that the state court made unreasonable determinations of fact based on the evidence presented under 28 U.S.C. §2254(d)(2), if it required such strict deference.

So, the federal courts should review the state trial court record and calibrate what "unreasonable" means on a case by case basis. As Congress did not give any guidance to determine what was or was not unreasonable, or what degree of deference is required this Court should provide that guidance now.

If someone spends the rest of his or her life in prison, based upon the incorrect application of clearly

established federal law or an incorrect determination of the facts, how can that be reasonable?

II. The Sixth Circuit's Decision Disposes of the Need to Prove a Specific Intent to Kill in Ohio Aggravated Murder Prosecutions, in Contradiction to U.S. Supreme Court Case Law.

Intent to kill is an essential element of aggravated murder. Morei v. United States, 127 F. 2d 827, 830-831 (6th Cir. 1942). Likewise, there can be no conviction for murder in this case under the felony murder rule. In State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980), the Ohio Supreme Court accurately pointed out that Ohio does not strictly follow the felony murder rule. In Ohio, "purpose to kill is an essential element of the crime of first degree murder." Id. at 165 (Citing *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976)). As such, without proof that Brown purposely caused the death of John Hill during the commission of an enumerated felony under R.C. 2903.02(B), he cannot be convicted of murder.

Pursuant to former R.C. 2903.01, in effect on August 14, 2001:

> * * * (B) No person shall **purposely** cause the death of another * * *while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary,
>
> or escape.* * * (Emphasis added).

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

R.C. 2901.22 states:

A person acts **purposely when it is his specific intention to cause a certain result** . . . (Emphasis Added).

The panel's decision, dispenses with intent by implying that presence at the crime scene is sufficient to convict. This conflicts with the U.S. Supreme Court's Decision in Taylor v. State of Louisiana,370 U.S. 154, 82 S.Ct. 1188 (1962), and the decision in Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979) stating the protections in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), prohibit the conviction of a defendant solely on evidence that he was present at the crime scene. Speigner v. Jago also held that mere presence at a crime scene, even if participating in some form of criminal activity, is not sufficient to convict under the charges indicted. Id. at 1213.

Footnote 16 of the *Jackson* reads in context:

The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone v. Powell*, *supra*. The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. *E. g., Mullaney v. Wilbur*, 421 U.S., at 697-698,

> 95 S.Ct., at 1888-1889 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused). Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.
>
> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254-if the settled procedural prerequisites for such a claim have otherwise been satisfied-the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. (Footnote Omitted). Id. at 323-324.

The court of appeals concluded that John Hill was murdered as a result of the attack on the Hill Brothers in their apartment. (Opinion, pg. 21, Appendix A, pgs. 36a-37a). It also concluded that the trier of fact could reasonably conclude that Brown engaged in actions where murder was a natural and probable consequence of the force used. Id. The court of appeals' argument is that the violence used in the robbery created circumstances that "in all probability would endanger human life." Id. Yet the coroner testified that John Hill was not severely beaten. Therefore, there is insufficient to prove specific intent to kill where the force used by defendant was fist fighting, not brandishing or firing a gun. The coroner testified that John Hill died due to gunshots, not a beating. Still, the panel concluded that: "Given Brown's active participation in the physical beatings and home

invasion, there is no question that had John Hill died as a result of a physical being beating . . . petitioner would be liable for aiding and abetting that death. The fact that the beating of John Hill escalated into a shooting death in no way exonerates the petitioner from complicity." (Opinion, pg. 22, Appendix A, pg. 38a). The serious error here is that there was no evidence that Brown or any of his companions shot John Hill. To allow Brown's conviction to stand eliminates the state's obligation to prove specific intent to kill in obtaining an aggravated murder conviction.

The Sixth Circuit then repeated the lower courts' error of stacking inferences. The court of appeals assumed that the beating escalated into a shooting when there was absolutely no evidence that anyone involved in the fighting shot John Hill. The lower court had to assume that was what happened with no proof that it did, in order to reach the conclusion that Brown is liable for the death. The trial court transcript shows that the factual and legal conclusions drawn by the state courts were unreasonable and the federal habeas courts should have rejected them.

Moreover, in order for a defendant to be guilty of aiding and abetting, the evidence must show that he shared the same criminal intent of the principal. Evidence must demonstrate that the defendant committed overt acts or affirmative conduct to further the offense, and intended to facilitate the commission of the crime. United States v. Head, 927 F.2d 1361, 1369 (6th Cir., 1991), *cert. denied,* 502 U.S. 846, 112 S.Ct. 144 (1991)(citing *United States v. Winston,* 687 F.2d 832, 834-35 (6th Cir.1982)); Morei v. United States, 127 F. 2d 827, 830-831 (6th Cir. 1942); United States v. Luciano-Mosquero, 63 F.3d 1142 (1st Cir.

1996), *cert denied,* 517 U.S. 1234 (1996) (No evidence that the defendant took steps to assist in the use of a firearm); United States v. Barnett, 197 F.3d 138 (5th Cir. 1999) (insufficient evidence of conspiring or aiding and abetting murder for hire when defendant did not share intent with principal).

None of the witnesses for the state identified Brown as assisting in anyway with the commission of an aggravated murder (or aggravated robbery or attempted murder). There was no evidence presented that Brown had any knowledge of any robberies or another's intentions to fire or use a gun for any reason, until well after these events occurred. He did not know a companion (Cortez) was intending to steal anything until *after* both fights were over, and Brown went back into the apartment complex to look for Cortez. (J.A. Vol. 2, pg. 837-838). Brown's defense that he did not know any robberies were to occur was un-rebutted by the state. Once Brown saw what appeared to be a gun on Cortez after the two fights were over, he left Cortez behind and fled with the other fighters (Mikey and Rock). (J.A. Vol. 1, pgs. 827, 861). Brown did not learn that someone had been shot until he heard it on the news. (J.A. Vol. 1, pgs. 850-851). There was no evidence Brown, with or without the other men, planned to rob or kill anyone and the state court of appeals failed to point to any evidence besides Brown's presence at the Grant and Hill apartments. The Ohio court of appeals speculated Petitioner must have known robberies were planned by Cortez and intended to assist him, because he was in a fight with Grant at the time Cortez said he stole property from Grant's apartment. The state court also assumed Appellant aided and abetted Cortez because he was fighting with Jeramie Hill, during the general time frame that

another witness (LaToya Dixon) said she saw some unidentified person with music CDs in the Hill apartment. There is more than enough clear and convincing evidence in the record that the state court of appeals determination of facts was unreasonable, rebutting the presumption of correctness.

In addition, Ohio's complicity statute reads:

> R.C. 2923.03(A)(2) -- Complicity (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (2) Aid or abet another in committing the offense.

Petitioner may also prevail if the state court's decision was contrary to clearly established U.S. Supreme Court case law, which does not require the application of the "unreasonable" standard. Williams v. Taylor, 529 U.S. 362, 405-406 (2000). Ultimately, if the *reasoning or results* of state court errors are contrary to federal law, relief may be granted. Early v. Packer, 537 U.S. 3, 8 (2002) and Panetti v. Quarterman, 551 U.S. ----, 127 S.Ct. 2842, 2858-2459 (2007) (Citing *Ford v. Wainwright,* 477 U.S. 399, 423-424, 106 S.Ct. 2595).

All of the above cases conclude that intent to kill must be proven beyond a reasonable doubt. Even if the accused knows a crime is about to be committed, that is not enough to make him liable as an aider or abetter. If the accused is not at the scene of the crime at the time of the killing, did not participate in the killing, and there is no proof of a conspiracy, liability does not attach. Therefore, the state court of appeals unreasonably determined the facts of this case, based

on the evidence presented at trial, and its conclusion upholding Brown's conviction for aggravated murder is contrary to, and an unreasonable application of, federal constitutional law.

As none of the necessary elements were present to prove specific intent to kill, the Sixth Circuit's Opinion functionally dispenses with the need to prove specific intent to kill in Ohio aggravated murder prosecutions.

III. The Sixth Circuit's Decision Newly and Improperly Sanctions the Stacking of Inferences in Order to Prove the Identity of a Murder Suspect and to Impute Specific Intent to Kill to an Alleged Aider and Abetter in Ohio Aggravated Murder Prosecutions, in Contradiction to U.S. Supreme Court Case Law Precedent as Previously Applied by Sixth Circuit Court of Appeals.

The Sixth Circuit's Opinion states that Brown's writ was only based upon whether or not there was sufficient evidence to convict him. (Opinion, pgs. 1-2, Appendix A, 1a). Yet, within that analysis are many subsections. The most important subjection was that the state trial court and appellate courts stacked inferences in order to reach the strained conclusion that Brown was guilty of aggravated murder and aggravated robberies. The stacking of inferences is contrary to the established law of this Court as applied through the Sixth Circuit's previous decisions.

Stacking inferences violates the accused's right to due process under the 5th and 14th Amendments to a fair trial and to have his guilt proven by sufficient

evidence. Hopson v. Foltz, 818 F.2d 866 (6th Cir. 1987). It creates "facts" that are not present, requiring the fact finder to assume the existence of facts that are not supported by the evidence presented at trial.

The court of appeals did not address the stacking of inferences engaged in by the state appellate court. Petitioner presented clear and convincing evidence that there was an unreasonable determination of the facts. He detailed cites to the trial court record and the state court of appeal's decision to show how the state court stacked inferences and where the record did not support the factual conclusions of the state court of appeals.

Still, the Sixth Circuit did not point to any evidence in the record to show that Brown was in the Hill apartment when John Hill was shot, that anyone in Brown's group shot John Hill or that Brown shared the same criminal intent with anyone in his group to kill John Hill. It simply assumed all this to be true.

The lower court speculated that the fact finder could have concluded that Brown's agitated state in the Hill apartment incited others to escalate the conflict. Again, this stacks inferences with speculation. No one knows who shot John Hill or why. (Opinion, pg. 23, Appendix A, pg. 39a).

In United States v. Hall, 71 F.3d 569, 572 (6th Cir. 1995), the court of appeals held an aider and abettor conviction requires proof that the accused did some affirmative act to aid, abet, counsel, command, induce, procure, or willfully cause the behavior which resulted in the death. And, here, no one saw John Hill get shot. No one knows who shot John Hill. No one knows the

exact circumstances under which he was shot. The coroner said he could have been beaten up to one hour before he was shot. There was no ballistics evidence linking the shooting to anyone in Brown's group. And no one from the apartment complex testified to hearing any shots fired. Therefore, it cannot be concluded that John Hill was shot during, or as a result of, the commission of a predicate felony, and it cannot be reasonably concluded that Brown aided or abetted the killing.

The Sixth Circuit's decision also conflicts with its own precedent in the case of Fuller v. Anderson, 662 F.2d 420, 424 (6th Cir. 1981), where the court observed that:

> Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent.

In conclusion, the lower court reiterates that as long as it was not unreasonable for the trier of fact to conclude Brown's guilt beyond a reasonable doubt it must affirm the denial of the writ, even though the truth of whether or not Brown incited others to kill is unknown. (Opinion, pg. 23, Appendix A, pg. 39a).

It is respectfully stated that it is unreasonable to base a conviction on the stacking of inferences and speculation, and this Court should grant the petition or otherwise rule in order to make this standard clear to all state and federal courts.

IV. The Sixth Circuit's Decision Virtually Eliminates a Prosecutor's Obligation to Present Sufficient Evidence to Prove a Defendant's Guilt, by Misinterpreting the Strictures of 28 U.S.C. §2254, and thereby Violating of the One of the Most Fundamental of All Constitutional Rights of Criminal Defendants.

At page 13 of the panel's Opinion (Appendix A, pg. 25a), it states that "even were we to conclude that a rational trier of fact could *not* have found a petitioner guilty beyond a reasonable doubt on habeas review, we must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." The question then becomes what is reasonable about sending a man to prison on insufficient evidence? This is the most basic of our Constitutional principals and is unique in its affect on liberty.

In support, the court of appeals cited this Court in Knowles v. Mizayance, ___ U.S.___, 129 S.Ct. 1411, 1420 (2009), saying it is essentially powerless to grant the writ, even if there was insufficient evidence to convict. Mizayance is inapplicable to Brown's case because it dealt with ineffective assistance of counsel and specifically with whether or not it was reasonable for a defense lawyer to drop an ill-fated insanity defense. (Opinion, pg. 14, Appendix A, pg. 26a). This Court stated that due to the general standard applied in IAC cases the federal courts have even more leeway to find a state court decision reasonable:

> The question "is not whether a federal court believes the state court's determination under the *Strickland* standard "was incorrect but

> whether that determination was unreasonable-a substantially higher threshold *Schriro, supra*, at 473, 127 S.Ct. 1933. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations). Id.

Unlike any other constitutional right, the right to be proven guilty beyond a reasonable doubt, based upon sufficient evidence, is the deepest bedrock of our criminal justice system. That the Sixth Circuit would not grant a writ, even in the face of clear and convincing evidence that there was insufficient evidence to convict, is itself an unreasonable application of this Court's case law. That it misapplies or misinterprets 28 U.S.C. §2254(d)(1) to require such a result, and does so in a published opinion, should compel the Court to grant Brown's petition or otherwise reverse the Sixth Circuit's judgment.

The decision affirming Petitioner's conviction for aggravated murder with a gun specification was not unanimous. Therefore, unlike many cases before the Court, Brown's conclusions that there was insufficient evidence to convict are supported by a pre-existing judicial finding from a state court of appeals Judge, not just the arguments of an advocate. The dissenting Judge pointed out that the ***record did not show any***

evidence to convict Brown of aggravated murder with a gun specification.

V. The Sixth Circuit's Decision Erroneously Holds that Ohio's Robbery Statute can be Violated by Violating Ohio's Burglary Statute, in Contravention of Ohio's Robbery and Burglary Statutes and Fundamental Statutory Interpretation.

The court of appeals erroneously held that Ohio's aggravated robbery statute, which defines aggravated robbery a ***theft offense,*** can be violated by committing aggravated burglary, which is defined as entering someone's residence to commit any crime. Brown took responsibility for his crimes of fighting with Emmit Grant and Jeramie Hill in their apartments. He did not contest that he was guilty of felonious assault. The felonious assaults were the basis for the counts of aggravated burglary in his indictment, not the commission of theft offenses.

As stated in Brown's reply brief in the Sixth Circuit, a full reading of the state court of appeals decision clearly shows that it was aware that although aggravated burglary was included under Ohio Revised Code §2913.01(K) as a theft offense, Brown was indicted under the newer version of R.C. 2911.11, aggravated burglary, as defined as entering the dwelling place of another for the purposes of committing any criminal offense. (J.A. Vol. 1, pg.73). Petitioner was not charged with burglary as a theft offense. The indictment states that he was there to commit "a ***criminal offense . . . having inflicted or attempted or threatened to inflict physical harm*** . . . " (Emphasis added). (J.A. Vol. 1, pg. 74, 78)

Therefore, it is erroneous to conclude that a violation of the burglary statute automatically results in a violation of Ohio's robbery statute, especially given the language in Brown's indictment.

Indeed, the theft offenses were specifically anticipated by the aggravated robbery charges. Even though R.C. 2913.01(K) and R.C. 2911.01 still includes burglary in a list of other crimes that it classifies as theft offenses, or as a predicate to aggravated robbery, both must be read *in pari materia* with the burglary statute. These are obviously statutory artifacts that have been overlooked by the Ohio General Assembly for deletion.

This is a critical issue. The burglary statute in effect when Brown was indicted and its legislative history can be read in detail on pages 13-15 of his reply brief. This was grave error by the Sixth Circuit and will affect all like cases in the circuit if not corrected by this Court. It also lets stand an unreasonable application of federal law, as due process requires criminal statutes to be read in favor of the accused and against the state whenever there is any doubt in its meaning. United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515 (1971).

VI. The Sixth Circuit's Decision also Relinquished Virtually all Power to Determine if the State Court's Determination of the facts on Petitioner's Culpability for Any Gun Specifications, Attempted Murder Counts and for all Counts of Aggravated Robbery was Reasonable in Light of All Evidence Presented in the Trial Court, in violation

of U.S. Supreme Court Precedent and 28 U.S.C. §2254.

Brown respectfully requests that the Court also consider granting his petition to address the additional counts of conviction for all gun specifications, attempted murder counts and all counts of aggravated robbery, as they account for a significant portion of his sentence and as the lower courts' denial of his petition for a writ of habeas corpus on these counts resulted from its misinterpretation/ misapplication of federal statutory and constitutional law.

CONCLUSION

The Petition for a writ of certiorari should be granted for the reasons stated above. The Court may also want to consider a summary reversal of the Sixth Circuit's Judgment.

Respectfully Submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-4037/4043

[Filed June 2, 2009]

GERALD L. BROWN, *Petitioner-Appellant*,

v.

KHELLEH KONTEH, Warden, *Respondent-Appellee.*

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 05-00540—John D. Holschuh, District Judge.

Argued: April 25, 2008

Decided and Filed: June 2, 2009

Before: DAUGHTREY, GILMAN, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Andrew P. Avellano, Columbus, Ohio, for Appellant. M. Scott Criss, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Andrew P. Avellano, Columbus, Ohio, for Appellant. M. Scott Criss, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. A violent rampage through the Beacon Hill Apartment complex in Columbus, Ohio, on August 14, 2001, resulted in the burglary of two apartments, three aggravated robberies, two vicious beatings, and a murder. The petitioner, Gerald L. Brown, Jr., was eventually convicted for the numerous crimes. Although the State of Ohio sought to execute Brown for his participation in the offenses, a three-judge panel that heard the evidence against him sentenced him instead to life in prison without consideration for parole for 69 years. The petitioner then unsuccessfully attempted to overturn his convictions both through the Ohio state court appeals process and through habeas corpus proceedings in federal district court. Brown now appeals from the district court's denial of his habeas petition, alleging only that the Ohio state courts unreasonably concluded that the evidence adduced at his trial was legally sufficient to support the various convictions. For the reasons set forth below, we affirm the district court's ruling in part, reverse in part, and remand the case for entry of such

orders as are appropriate and necessary to comply with this opinion.

I. *FACTUAL BACKGROUND*

Because Brown's habeas petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), factual determinations made by the state courts are presumed to be correct. *See* 28 U.S.C. § 2254(e)(1). Moreover, only by clear and convincing evidence can a petitioner overcome that statutory presumption. *See id.* To demonstrate the enormity of Brown's task in this appeal, we quote at length from the recitation of the pertinent trial evidence by the Ohio Court of Appeals and thus highlight just how extensive and thorough that recapitulation was. In its opinion, the state appellate court summarized the evidence at the petitioner's trial as follows:

> According to the state's evidence, on or about August 14, 2001, LaToya Dixon, who was 16 years old at the time, paged Dennis Michael Williams, aka "Mikey," and invited him to her apartment. At that time, Dixon lived in apartment 2F at 4611 Refugee Road, Columbus, Ohio, in an apartment complex that was then called the Beacon Hill Apartments.
>
> Within about an hour, Williams, who was accompanied by male friends whom Williams later introduced to Dixon as "cousins" and with whom Dixon was unfamiliar, arrived at Dixon's apartment complex in two cars. Dixon met Williams and his companions in the parking lot of the apartment complex, and Dixon escorted

Williams and his companions to her apartment. At trial, Dixon could not recall Williams'[s] companions' names.

One of Williams'[s] companions asked Dixon if he could use her telephone. Dixon agreed. However, when the telephone apparently did not work, Williams'[s] companion attempted to break the telephone. Although Williams attempted to calm Dixon, Dixon became concerned and asked Williams'[s] companion why he was attempting to break her telephone.

Dixon, who was now concerned about her safety, then went across the hall to the apartment of a neighbor, Emmitt Grant, and asked for a "Black & Mild" cigar. According to Dixon, Grant was aware that Dixon did not smoke and by asking for the cigar Dixon had hoped "to let [Emmitt Grant] know that I felt like something was about to happen in my house." While Dixon was talking with Grant, some of the individuals that Dixon had allowed into her apartment observed Dixon through the peephole.

After talking with Grant, Dixon returned to her apartment. Upon returning to her apartment, Dixon and Williams went into the bathroom to talk. The men that accompanied Williams remained in Dixon's living room. At some point, Williams'[s] companions left Dixon's apartment.

Dixon and Williams then retired to Dixon's bedroom to have sex. However, Dixon

ultimately decided against having sex with Williams and left the apartment. As she exited the apartment, Dixon passed Williams'[s] companions, who were entering Dixon's apartment.

After exiting her apartment, Dixon went by the apartment complex's pool and came upon Jerramie Hill and John Hill, who inquired of Dixon what was happening. Dixon told the Hill brothers that she was waiting for Williams and his companions to leave her apartment and "[t]hey were acting crazy." Dixon also told the Hill brothers that they should not intervene.

Dixon then began walking with the Hill brothers. At some point, Williams and his companions jumped out from an entryway, surrounded the Hill brothers, and attacked them.

Dixon then ran to her apartment to change her clothes, "[b]ecause I didn't have-really have no clothes on. I had like a dress on. I didn't have no shoes or nothing on * * *." She later peered through a broken window into the Hill brothers' apartment. Dixon observed a man with many compact discs in his hand. She recognized this man as one of Williams'[s] companions. The apartment was in disarray and there was blood on the walls. Dixon also observed someone being beaten in the bathroom. She also heard screams and stomping sounds from the apartment. Dixon also recognized Williams'[s] voice coming from the Hill brothers' apartment. She did not hear

any gunshots, nor did she observe anyone being hit with a commercial blower that purportedly was in the Hill brothers' apartment.

Fearing for her own safety, Dixon fled to a friend's house. The next day she contacted police.

According to Emmitt Grant, who lived in apartment 2E across from Dixon's apartment, after a female friend with whom Grant had spent the evening left his apartment between 1 and 1:30 a.m. on August 14, 2001, Grant remained in his apartment and played video games. Because the weather was pleasant, he left the door to his apartment open.

According to Grant, at approximately 2 a.m. on August 14, 2001, he observed Dixon leave her apartment. Approximately five minutes later, Dixon returned to her apartment and was accompanied by some black males. Approximately five minutes later, Grant observed two men exit Dixon's apartment and go down the stairs. After a couple of minutes, these men returned to Dixon's apartment. Grant also heard one man, upon exiting Dixon's apartment scream, "Fuck, that. Who is he? Who is he?"

At some point, Grant closed the door to his apartment. As he retreated to his seat, there was a knock at his door. Dixon was at the door and asked Grant for a cigar. She did not appear to be upset. Dixon returned to her apartment and, as she opened the door to her apartment,

Grant observed several men in Dixon's apartment.

As Grant turned to return to his apartment, one of the men greeted Grant. Grant returned the greeting, entered his apartment, and closed the door. Later, however, because Grant felt that he should not have to close his door, he reopened the door to his apartment and left it halfway open.

A few minutes after Grant reopened his door, a man stood in the doorway to his apartment with his back toward Grant. The man looked over his shoulder and inquired as to what Grant was doing. Grant replied that he was playing a Dreamcast game.

As the man stood at the doorway, another man entered Grant's apartment without invitation from Grant and stood in front of a table by the couch. Next, the man who had been standing in the doorway entered Grant's apartment also without invitation and swung at Grant. A fight ensued. Two other men entered Grant's apartment and attacked Grant. During the fight, Grant saw a person run toward the back of his apartment. This same person slammed Grant's entertainment center to the floor.

During the fight, Grant observed a gun fall from the hip of the person that had first swung at him. Grant then heard others in the background scream, "Get your gun, get your gun. * * * He's about to get your gun." Grant's

hand was then kicked away from the gun that had hit the floor. A cable cord from Grant's videocassette recorder ("VCR") was wrapped around Grant's neck, and later an attacker hit Grant's head with a little table. After being struck three times in the head with the table, Grant fell to the floor. The man that had wrapped the cord around Grant's neck then said, "Fuck it. Let's drag his ass to the back." In court, Grant could not identify defendant as one of the men who had been in his apartment.

At some point, Grant escaped from his attackers. Grant ran across the apartment complex to an apartment that was illuminated. An elderly resident came to the door. Grant asked the resident to call Grant's family or friends. Instead, the resident called 911.

Officers Patrick Seaman and Aaron Dennis of the Columbus Division of Police responded to the location where the 911 call was placed by the elderly resident. Earlier police had also received another call from the resident in the apartment below Grant's apartment concerning a commotion or fight in Grant's apartment. After viewing Grant, Officers Seaman and Dennis summoned paramedics to attend to Grant's injuries.

Officers Seaman and Dennis then went to Grant's apartment to investigate and secure the crime scene. When Officers Seaman and Dennis arrived at Grant's apartment, Officer Seaman observed that the apartment was torn apart and it appeared that a fight had occurred in the

apartment. In the bedroom, Officers Seaman and Dennis found what appeared to be crack cocaine on a plate on a dresser. Officers Seaman and Dennis found no suspects in Grant's apartment.

While Officer Dennis remained at Grant's apartment, Officer Seaman returned to the location where the paramedic was treating Grant. Officer Seaman, along with a paramedic, then escorted Grant back to his apartment. During the walk to Grant's apartment, Officer Seaman saw a PlayStation game on the grass in the courtyard near another apartment. Because it was unusual to see an unattended PlayStation game in the middle of the grass, Officer Seaman remained to investigate while the paramedic and Grant continued toward Grant's apartment.

Near the location where the PlayStation game was found, Officer Seaman noticed a ground floor apartment with an open window. Because it was unusual to have a wide-open window in a ground floor apartment in this particular apartment complex that had a high crime rate, Officer Seaman went to the apartment to investigate. Looking through the window, Officer Seaman observed debris in the apartment. Next, Officer Seaman noticed that the door to the apartment was wide open. Officer Seaman radioed his location. Shortly afterward, Officer Seaman noticed blood on the door and a blood trail that appeared to start from the apartment and continue through the stairwell.

After announcing his presence, Officer Seaman entered the apartment. The apartment was torn apart and there was blood on the walls. As Officer Seaman passed the bathroom, he saw blood and noticed the bathroom was torn apart. As Officer Seaman entered the bedroom, he saw one white male, Jerramie Hill, curled in a fetal position on the bed and covered in blood. Another white male, John Hill, who was also covered in blood, was lying facedown on the floor. Officer Seaman radioed his findings. Officer Dennis, who had been in Grant's apartment, then left Grant's apartment to assist Officer Seaman.

Officer Seaman observed shell casings and one spent bullet. Next to John Hill, Officer Seaman noticed a pool of blood on the floor and a bullet wound on the body with burn marks around it. According to Officer Seaman, John Hill was dead.

Officer Seaman initially believed Jerramie Hill, who appeared badly beaten, was also dead. However, after determining Jerramie Hill was alive, Officer Seaman summoned a paramedic.

According to Jerramie Hill, a witness for the state, he and his brother, John Hill, were walking in the apartment complex when they saw Dixon standing underneath some steps. Dixon appeared upset and the Hill brothers asked her what she was doing. Dixon responded that there were some individuals in her apartment. While Jerramie and his brother were walking with Dixon toward their

apartment, four black males confronted Jerramie Hill and his brother. The men stopped the Hill brothers, asked the brothers to put their arms in the air, and patted them down. Then one man punched John Hill in the mouth and cut his lip. John Hill went toward some steps and spit blood out of his mouth. Then the Hill brothers went to their apartment.

At the apartment, John Hill went to the bathroom to clean his lip. As Jerramie Hill was trying to shut the screen to a window that had been broken the night before, one of the individuals that had stopped the Hill brothers came in through the broken window, opened the front door to the apartment, and let in the other two members of the group that had earlier confronted the Hill brothers.

After members of the group entered the apartment, the intruders queried Jerramie Hill about items in the apartment. Jerramie Hill attempted to represent that the items did not belong to him and he told the intruders they could take the items, such as a television and a Sega Dreamcast game system. The intruders questioned Jerramie Hill about who was in the apartment's back room. Jerramie Hill informed the intruders that his brother was in the back room.

The intruders ordered Jerramie Hill to help them carry items out of the apartment. At one point, Jerramie Hill attempted to flee the apartment.

One of the intruders grabbed Jerramie Hill, threw him to the floor and began to stomp on his head. Two other intruders went to the back of the apartment. According to Jerramie Hill, during the attack he drifted in and out of consciousness. However, Jerramie Hill recalled being hit over the head with a carpet blower that had been placed in his apartment to dry the carpet because the apartment previously had been flooded. Hill did not hear any gunshots.

Jerramie Hill regained consciousness while paramedics were attending to his injuries. According to Hill, he was hospitalized for more than a week following the attack, and that due to the attack his "balance is not the same." Further, he stated, "I've lost three of my jobs 'cause my movement wasn't fast enough." Hill could not identify any of the intruders.

According to the state, in addition to the attacks of the Hill brothers and Grant, items were also stolen from the Hill brothers' apartment and from Grant's apartment. According to Jerramie Hill, a television, compact discs, a dragon statue, and a Sega Dreamcast system were missing from his apartment. According to Grant, clothes, shoes, boots, a PlayStation 1 video game machine, Sega Dreamcast video game machine, a video game, jewelry, and a cell phone were missing from his apartment.

At trial, portions of a videotaped interview of defendant that was conducted on November 6,

2001, by Detective Carl Rankin of the Columbus Police Department were played and transcribed into the record. Detective Rankin also testified at trial. According to Detective Rankin, following Grant's assault, he had linear bruising from ear to ear, which was consistent with Grant's account of being choked with the VCR cable cord.

According to Detective Rankin, prior to interrogating defendant, defendant voluntarily waived his constitutional rights under Miranda. During the videotaped interview, defendant provided police with his factual account of the events of August 14, 2001. At the interview, defendant admitted to involvement with the attacks of Grant and the Hill brothers. However, defendant denied killing John Hill.

According to Dr. Dorothy E. Dean, forensic pathologist and deputy coroner, based upon her evaluation, John Hill sustained blunt-force injuries and eight entrance gunshot wounds, although two of these entrance gunshot wounds may have been reentry wounds, thereby suggesting he had been shot six times in total. According to Dr. Dean, John Hill died from bullet wounds to his torso that injured his heart and arteries. Based upon the autopsy, Dr. Dean opined that John Hill had not been beaten severely prior to his death.

In contrast to the state's evidence, defendant presented a differing version of the events of August 14, 2001.

According to defendant, on the evening of August 14, 2001, LaToya Dixon paged Mikey Williams, a "cousin" of defendant, and invited Williams to Dixon's apartment. At the time Williams received Dixon's page, Williams was with defendant, James Ingram, aka "Rock," and Cortez Smith. Prior to this time, defendant was not acquainted with Cortez Smith.

Defendant, who had been drinking, James Ingram, and Cortez Smith accompanied Williams to Dixon's apartment. Defendant and Ingram rode with Williams while Smith drove another vehicle and followed the others to Dixon's apartment.

Although Dixon did not know Williams'[s] companions, she allowed Williams and his companions to enter her apartment. According to defendant, there may have been an understanding between Williams and his companions that they would have sex with Dixon.

At one point, Dixon left her apartment and later returned. After the planned sex did not materialize, defendant, Ingram, and Smith left Dixon's apartment. Williams remained in the apartment.

While defendant and the others were outside Dixon's apartment, defendant and Emmitt Grant exchanged stares and words. Defendant informed Williams about the encounter with Grant. Defendant, Williams, and Ingram then entered Grant's apartment and fought with

Grant. Williams was the first person to punch Grant. During the fight, defendant held Grant and punched him in the ribs while Ingram punched Grant in the face. During the fight, defendant did not know the whereabouts of Smith. At some point, Grant escaped and fled. Williams pursued Grant. Defendant and Ingram followed.

Defendant, Ingram, and Smith then came upon the Hill brothers. A fight ensued and continued in the Hill brothers' apartment. Defendant admits that he beat Jerramie Hill while he was in the Hill brothers' apartment and that he struck John Hill. However, defendant denies that he struck Jerramie Hill with a commercial blower or that he ever threatened the use of a handgun. Defendant also claimed he was not in the bedroom when John Hill was shot. According to defendant, he did not shoot John Hill, nor did he hear any gunshots.

After fighting with the Hill brothers, defendant, along with Williams, Ingram, and Smith, headed toward Williams'[s] car. Smith, however, decided to return to the apartments to steal a video game. Because Smith was gone awhile, defendant searched for him. While searching for Smith, defendant reentered the Hill brothers' apartment and observed that neither Jerramie Hill nor John Hill was moving. Smith was not in the Hill brothers' apartment.

Defendant then observed Smith coming downstairs from the area of Grant's apartment.

Smith was carrying a video game. Defendant also observed a shiny object in Smith's hand, which Smith put in his pocket. Defendant believed the shiny object was a gun.

Defendant, Williams, Ingram, and Smith then left the apartment complex. Defendant and Ingram rode with Williams, while Smith drove away separately.

According to Tom Stanley, a fire department paramedic who attended to Emmitt Grant on August 14, 2001, the courtyard where Grant was examined was dark and Stanley could not recall observing any bruising along Grant's neck. Cf. testimony of Detective Rankin who testified Grant had bruising on his neck. Additionally, according to Stanley, Grant refused to be transported to the hospital.

Detective Edward Cox of the Columbus Police Department testified regarding the arrest of Cortez Smith related to a series of robberies that occurred in November 2001. Detective Cox also testified about the items that were recovered from Smith at the time of his arrest in November 2001. These items included two chrome .32 caliber semiautomatic pistols and a pair of red work boots. However, according to earlier cross-examination testimony of Detective Rankin in the state's case in chief, although a .32 caliber weapon was used in the killing of John Hill, the weapons recovered from Smith in November 2001 were not the weapons used in the killing of John Hill.

Officer Aaron Dennis of the Columbus Police Department testified that he did not observe any linear bruising of Emmitt Grant's neck. According to Officer Dennis, after he and Officer Seaman investigated Grant's apartment, both he and Officer Seaman returned to Grant, who was receiving medical treatment by paramedics. He and Officer Seaman intended to escort Grant to his apartment and question him about the events that occurred in his apartment and about the suspected crack cocaine that Officers Seaman and Dennis found in his apartment.

According to Officer Dennis, he and Grant headed toward Grant's apartment while Officer Seaman stayed behind. While Officer Dennis was with Grant in Grant's apartment, Officer Dennis heard Officer Seaman's radio transmissions. After hearing Officer Seaman's second radio transmission, Officer Dennis left to assist Officer Seaman.

Approximately 20 minutes later, Officer Dennis returned to Grant's apartment. After returning to Grant's apartment, Officer Dennis noticed that the suspected crack cocaine that was in Grant's bedroom was no longer there.

Cortez Smith, who at the time of his testimony was incarcerated related to charges arising from the circumstances of this case as well as another case and who had entered into a plea agreement with the state, testified that he stole a Sega Dreamcast video system, a video game, and clothes, including red boots, from Emmitt Grant's apartment. On direct

examination, Smith admitted to a history of substance abuse, which included the use of alcohol, "weed," ecstasy, and cocaine.

According to Smith, on the morning of August 13, 2001, he had used alcohol, marijuana, and ecstasy. Later that same day, Smith went to an apartment where he met Williams, Ingram, defendant, and others. According to Smith, at that apartment, alcohol was consumed and there also might have been cocaine use.

From this apartment, Smith drove in a separate car to the Beacon Hill apartment complex, while Williams, defendant, and Ingram rode to the Beacon Hill apartment complex in Williams'[s] car. According to Smith, the first time he met LaToya Dixon was on the night of August 14, 2001, in her apartment. Smith confirmed that a fight had occurred in Emmitt Grant's apartment, but Smith did not recall hearing anyone state, "Let's open him [Grant] up" or words that could be vaguely construed as this.

According to Smith, he was in Grant's apartment approximately three to five minutes. After taking the Sega Dreamcast video system and other items, Smith testified he went to the car that he was driving and put the stolen items into the backseat. Then, according to Smith, he returned to both Grant's apartment and Dixon's apartment and found no one there. Smith then left. According to Smith, he was at the Beacon Hill apartment complex a total of approximately

15 to 20 minutes. According to Smith, when he left the apartment complex, Williams'[s] car was still in the parking lot.

On cross-examination, Smith testified that he observed defendant and the others fighting Emmitt Grant in the living room of Grant's apartment. According to Smith, he entered Grant's apartment after the fight had begun. After entering Grant's apartment, Smith went to Grant's bedroom to investigate whether there was anything of value that he could steal. Smith admitted to stealing items from Grant's closet, but he denied rummaging through Grant's dresser drawers. After stealing items from Grant's bedroom, Smith stole a Sega Dreamcast video system on his exit from Grant's apartment.

On redirect examination, Smith testified that he recalled seeing the Hill brothers; however, Smith did not recall exactly when he saw them.

According to Smith, during the fight in Grant's apartment, a gun dropped to the floor. Smith did not pick up the gun, but he did observe someone else pick up the gun. Smith described the gun that fell to the floor as "[l]ike them guns that Germans have in them old German movies, like-like dark-dark black, like a black gun. I think it was a wood handle with like funny kind of-kind of nozzle on it or barrel, whatever you call it." According to Smith, he thought he had seen the gun earlier in the evening. Smith denied handling the gun.

By an 11-count indictment filed November 15, 2001, defendant was charged with two counts of aggravated burglary, each count with two specifications; three counts of aggravated robbery, each count with two specifications; two counts of attempted murder, each count with two specifications; two counts of felonious assault, each count with two specifications; and two counts of aggravated murder, each count with five specifications.

On September 6, 2002, defendant waived his right to a jury trial and elected to be tried by the court. A panel of three judges was assigned to hear the case.

On September 17, 2002, the lead prosecutor filed an affidavit that requested the disqualification of one judge who was assigned to the three-judge panel that was scheduled to hear the case. On October 9, 2002, the Chief Justice of the Supreme Court of Ohio denied the requested disqualification of the assigned panel member.

A trial was held in late November 2002. The three-judge panel found defendant guilty of all charges in the indictment. However, with respect to count ten, aggravated murder as it related to aggravated burglary, the panel found defendant was not the principal offender in the commission of the aggravated murder and the aggravated murder was not committed with prior calculation or design. Furthermore, with respect to count eleven, aggravated murder as it related to aggravated robbery, the panel

> found defendant was not the principal offender in the commission of the aggravated murder and the aggravated murder was not committed with prior calculation and design.
>
> Finding that several mitigating factors existed according to a preponderance of the evidence, the trial court excluded the death penalty as a possible sentence. Instead, the trial court sentenced defendant to life with no consideration for parole for 69 years.

State v. Brown, No. 03AP-130, 2004 WL 1277498, at *2-9 (Ohio App. 10 Dist. June 10, 2004) (footnotes, citations, and internal quotation marks omitted).

After recounting that evidence, two judges of the Ohio Court of Appeals engaged in an equally thorough and meticulous exposition of how an application of relevant Ohio criminal law precepts to those facts supported Brown's felony-murder conviction, as well as his convictions for the additional charged offenses. The majority first noted that Brown failed to challenge four of his convictions: the aggravated burglary of Emmitt Grant (Count 1); the felonious assault of Emmitt Grant (Count 4); the aggravated burglary of the apartment of the Hill brothers (Count 5); and the felonious assault of Jerramie Hill (Count 9). The legitimacy of those convictions thus was not properly before the appellate court.

In addressing the petitioner's challenge to his three aggravated robbery convictions, the state-court majority first conceded that "there is no evidence that defendant himself possessed or had under his control a gun during the aggravated robberies of August 14,

2001, and therefore the evidence does not support a finding that defendant was a principal offender with respect to the charges of aggravated robbery" of Emmitt Grant, Jerramie Hill, and John Hill. *Id.* at *11. Nevertheless, the court noted that Ohio law permits an aggravated robbery conviction, even if the defendant did not personally possess a weapon, if that defendant "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 754 N.E.2d 796, 801 (Ohio 2001). Finding that Brown did so assist in the robberies, the majority affirmed those convictions.

Similarly, the majority of the Ohio Court of Appeals concluded that Brown could be held responsible for the murder of John Hill and for the charged gun specifications, in part because the petitioner knew that at least one of his companions possessed a firearm. Furthermore, the court reasoned that Brown, "through his participation in the crimes that occurred in the Hill brothers' apartment, supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of aggravated murder, and that the [petitioner] shared the criminal intent of the principal in the purposeful killing of John Hill." *Brown*, 2004 WL 1277498, at *16.

One judge of the state appellate court dissented in part. In that partial dissent, Judge Bryant stated that, because the murder of John Hill was not necessary to carry out the purposes of the group's criminal activities, and because the evidence at trial did not necessarily place Brown in the back bedroom where Hill was murdered, the constitutional

evidentiary standard for criminal convictions had not been satisfied. *See id.* at *20 (Bryant, J., concurring in part and dissenting in part).

After Brown filed his habeas corpus petition in federal court, the district judge referred the matter to a magistrate judge for an initial determination of facts and a recommended disposition. Noting the federal courts' limited discretion in most habeas review, the magistrate judge quoted extensively from the state appellate court opinion and recommended denial of the petition. The district court adopted that recommendation, entered an order finding the trial evidence constitutionally sufficient to sustain Brown's convictions, and denied the petition for habeas corpus relief in its entirety. Following denial of the petitioner's subsequent motion to alter or amend that judgment, Brown perfected this appeal.

II. *DISCUSSION*

A. *Standard of Review*

At the outset, it is important to recognize, as did the magistrate judge in this case, just how limited is our review in a habeas proceeding. Pursuant to the provisions of AEDPA, a federal court may not grant the writ unless the state court adjudication on the merits either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As explained by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

In deciding whether a state court ruling involved an "unreasonable application" of federal law, a habeas court does not focus merely upon whether the state court decision was erroneous or incorrect; rather, a federal court may issue a writ of habeas corpus only if the state court's application of clearly-established federal law was objectively unreasonable. *See id.* at 409-11.

In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who

might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. *See United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could *not* have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable. *See* 28 U.S.C. § 2254(d)(2).

Cognizant of these mandated glosses upon our review, we undertake an examination of the sufficiency of the evidence for each of the counts of the indictment under which Brown was convicted. Again, we emphasize, before beginning this evaluation, that we cannot rely simply upon our own personal conceptions of what evidentiary showings would be sufficient to convince us of the petitioner's guilt. We cannot even inquire whether *any* rational trier of fact would conclude that petitioner Brown is guilty of the offenses with which he was charged. Instead, we must determine whether the Ohio Court of Appeals itself was unreasonable in *its* conclusion that a rational trier of fact could find Brown guilty beyond a reasonable

doubt based upon the evidence introduced at trial. *See, e.g., Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) ("The question 'is not whether a federal court believes the state court's determination . . . was incorrect but whether that determination was unreasonable– a substantially higher threshold.'") (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

B. *Crimes Committed Against Emmitt Grant*

Aggravated Burglary (Count 1)

Brown has not challenged, either in this appeal or before the Ohio Court of Appeals, his conviction for the aggravated burglary of Emmitt Grant's apartment. Consequently, we deem any objection to the legal sufficiency of the evidence offered to prove the petitioner's guilt of that offense to have been waived. *See, e.g., Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996).

Aggravated Robbery (Count 2)

Under Ohio law, "[n]o person . . . committing a theft offense . . . shall . . . [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[,] [or] [i]nflict, or attempt to inflict, serious physical harm on another." *See* O.R.C. §§ 2911.01(A)(1) and (3). Should an individual commit such a theft offense while using, displaying, or brandishing a weapon, or while inflicting serious physical harm on another, that person will be guilty of aggravated robbery.

A wrongdoer need not *personally* steal items from another; *personally* use, display, or brandish a weapon; or *personally* inflict serious physical harm on a victim in order to justify conviction pursuant to the provisions of section 2911.01(A) of the Ohio Revised Code. Rather, an individual like Brown may be found guilty of aggravated robbery simply by aiding or abetting another person in the commission of the offense. To be liable as an aider or abettor, however, "mere association with a principal offender is not enough .... [T]here must be some level of active participation by way of providing assistance or encouragement." *State v. Nievas*, 700 N.E.2d 339, 343 (Ohio Ct. App. 1997) (citation omitted). In the words of the Ohio Supreme Court, "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *Johnson*, 754 N.E.2d at 801. Indeed, the intent necessary to support a conviction "may be inferred from presence, companionship and conduct before and after the offense is committed." *State v. Mootispaw*, 674 N.E.2d 1222, 1224 (Ohio Ct. App. 1996).

In this case, Brown insists that he was merely present in Grant's apartment – albeit beating the victim mercilessly – while co-defendant Cortez Smith was vandalizing the property. Furthermore, because the petitioner had met Smith only that evening, he claims that he cannot be held accountable for the aggravated robbery because he was not then in a position to know of Smith's criminal intentions when Smith entered Grant's apartment *after* the petitioner began his assault on the victim.

As explained above, however, the Ohio state law offense of aggravated robbery is complete upon the commission of any "theft offense" accompanied by the infliction of "serious physical harm on another." O.R.C. § 2911.01(A)(3). Brown clearly committed a "theft offense" and clearly inflicted "serious physical harm on" Emmitt Grant. Pursuant to the provisions of section 2913.01 of the Ohio Revised Code, a "theft offense" includes, among other things, "[a] violation of section . . . 2911.11 . . . of the Revised Code." O.R.C. § 2913.01(K)(1). Section 2911.11 criminalizes aggravated burglary, an offense to which Brown has admitted by failing to contest it in state and federal court proceedings. In any event, even had the aggravated burglary conviction been challenged, the statutory definition of "theft offense" also includes simple burglary, O.R.C. § 2911.12, which entails merely trespassing in an occupied structure with an intent to commit "any criminal offense." Brown's entry into Grant's apartment to assault the victim thus satisfies one prong of the aggravated robbery evidentiary requirement. The brutal beating of Grant that included hitting him in the head with furniture and tightening a cable around his neck so securely that ligature marks were later seen by witnesses further satisfies the "serious physical harm" component of the offense and justifies the state court decision to find sufficient evidence of petitioner Brown's guilt of aggravated robbery. Because the Ohio Court of Appeals's ruling on the claim of insufficient evidence relating to the charge of aggravated robbery of Emmitt Grant thus was not unreasonable, the district court did not err in denying habeas relief on this issue.

Attempted Murder (Count 3)[1]

The petitioner was also convicted at trial of the attempted murder of Emmitt Grant. Grant testified that he was severely beaten in his own apartment, that he was struck multiple times in the head with a small table, and that a cable cord was wrapped around his neck tightly enough that ligature marks could be seen. Brown insists on appeal, however, that he could not be held responsible for that crime because no trial witness identified him as one of Grant's assailants.

Pursuant to the provisions of section 2903.02(B) of the Ohio Revised Code, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not [voluntary manslaughter] or [involuntary manslaughter]." Nor shall a person attempt to murder another individual by "purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, [engaging] in conduct that, if successful, would constitute or result in [murder]." O.R.C. § 2923.02(A).

Brown is correct that the testimony of no other witness definitively identifies him as one of the assailants in Grant's apartment at the time of the beating and partial strangulation of the victim. The petitioner's own statement to the police, however,

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[1] No discussion of any habeas corpus claim related to the charge in Count 4 of the indictment alleging felonious assault of Grant is required, because that charge merged into the attempted murder conviction under Count 3.

indicates that he was indeed an active participant in the brutal beating of Emmitt Grant. In Brown's own words, "I'm standing up against the wall like this with the guy like this; and I'm punching him in the ribs, you know what I'm saying. [A companion] hit him in the head, and I'm punching him in the ribs." Although Brown disclaimed knowledge of any cord being placed around Grant's neck, other evidence of the petitioner's involvement in the attack was placed before the finders-of-fact; as a result, the Ohio Court of Appeals clearly was not unreasonable in concluding that Brown at least aided and abetted those individuals who assaulted Grant so viciously that the attack could have resulted in the victim's death. The district court's denial of habeas relief on this ground thus must be affirmed under prevailing AEDPA standards.

C. *Crimes Committed Against Jerramie and John Hill*

Aggravated Burglary (Count 5)

Brown has not challenged, either in this appeal or before the Ohio Court of Appeals, his conviction for the aggravated burglary of the Hill brothers' apartment. Consequently, we deem any objection to the legal sufficiency of the evidence offered to prove the petitioner's guilt of that offense to have been waived. *See, e.g.*, *Bickel*, 96 F.3d at 153.

Aggravated Robbery (Counts 6 and 7)

As stated previously, Ohio law defines aggravated robbery, in part, as a theft offense accompanied by the infliction, or attempted infliction, of serious physical harm on another. *See* O.R.C. § 2911.01(A)(3).

Although Jerramie Hill could not positively identify any of the individuals who broke into his apartment in the early morning hours of August 14, 2001, in Brown's own statement to the police he admitted that he and at least one of his companions that night had indeed broken into the Hills' apartment and assaulted the brothers. Furthermore, LaToya Dixon, from the vantage point of her own apartment, was able to see one of Brown's companions leaving the apartment that night with a stack of compact discs. Jerramie Hill also testified that not only were numerous compact discs taken from his apartment, but he was also missing a video game and video game player, a television, and a statue of a dragon.

In any event, the petitioner has conceded, through his failure to challenge the propriety of his aggravated burglary convictions in either state or federal court, that he is guilty of committing a "theft offense" against the Hills. *See* O.R.C. § 2913.01(K)(1) (defining "theft offense" as, among other crimes, a violation of the statute criminalizing aggravated burglary). That concession, in conjunction with Brown's own statement to the police admitting that he "inflict[ed] . . . serious physical harm on another" established all the necessary elements of the offense of aggravated robbery. Indeed, the petitioner told police that he began assaulting Jerramie Hill in Hill's own apartment, with the beating occurring both in the front room of the dwelling and in the back bedroom. According to Brown:

> I'm hitting him – hitting him, hitting him – just I'm hitting him. He hit – you know what I'm saying. I'm hitting.

. . . . .

> He – I think he was probably was unconscious or something, 'cause I hit him a pretty good amount of times with my hand 'cause like I said, my whole – I mean, I was at work, and I had to go home because my whole hand was swollen.

Furthermore, while Brown was beating Jerramie Hill, James "Rock" Ingram was also in the apartment "fighting the other guy" -- John Hill.

On direct appeal, the Ohio Court of Appeals construed the evidence at trial in the light most favorable to the prosecution and concluded that "by assaulting Jerramie Hill in the Hill brothers' apartment while one of defendant's companions burglarized the Hill brothers' apartment, . . . [the] defendant was connected to or involved with the aggravated robber[y] of . . . the Hill brothers." The state court thus found that a reasonable trier of fact could "conclude defendant supported, assisted, or cooperated in the aggravated robber[y] of . . . the Hill brothers." Such a conclusion is not unreasonable in light of the evidence contained in the appellate record. Consequently, we are not authorized to reverse the district court's denial of habeas relief on this ground.

Attempted Murder of Jerramie Hill (Count 8)[2]

The petitioner argues ineffectively that he should not have been convicted of the attempted murder of Jerramie Hill because Hill could not identify Brown as his assailant and because no other witness testified that Brown was indeed the person who brutally beat Jerramie Hill. Those argumentative statements are true – as far as they go. What the petitioner fails to mention, however, is the fact that *Brown's own statement* to the police contains his admission and detailed description of his entry into the Hills' apartment and of his savage attack upon Jerramie Hill. In fact, that beating was so violent that Hill lost consciousness and Brown later was forced to leave work and return home because his hand was swollen from repeatedly striking the victim.

The Ohio Court of Appeals, "construing the evidence in favor of the prosecution, [found] a trier of fact reasonably could conclude that defendant engaged in conduct that, if successful, would result in purposely causing the death[ ] of . . . Jerramie Hill." Such a conclusion that the prosecution established the elements of the offense of attempted murder, *see* O.R.C. §§ 2903.02 and 2923.02(A), is nothing if not reasonable. We thus affirm the district court's conclusion denying habeas relief on the petitioner's claim related to his conviction for the attempted murder of Jerramie Hill.

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[2] Just as the indictment count alleging felonious assault upon Emmitt Grant merged with the petitioner's conviction for the attempted murder of Grant, Count 9 of the indictment alleging a felonious assault upon Jerramie Hill merged with the conviction of Brown for the attempted murder of Hill.

Aggravated Murder of John Hill (Counts 10 and 11)[3]

On appeal, Brown also challenges the constitutionality of his conviction for aiding and abetting the aggravated murder of John Hill during the commission of an aggravated robbery. He contends that the prosecution could not establish his guilt of that offense beyond a reasonable doubt because "[t]he record is bereft of any evidence that Gerald Brown intended to purposefully cause the death of John Hill," because there was no testimony or evidence that Brown planned to commit an aggravated robbery, and because no evidence linked the petitioner to the actual killer. *See* Appellant's Br. at 21.

In addressing the challenge to the sufficiency of the evidence for this conviction on direct appeal, the Ohio Court of Appeals explained:

> Pursuant to [the version of Ohio Revised Code Section 2903.01 in effect at the time of the commission of the crimes at issue]:
>
> > (A) No person shall purposely, and with prior calculation and design, cause the death of another * * *.
> >
> > (B) No person shall purposely cause the death of another * * * while committing

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[3] The conviction of the petitioner for Count 10 (aggravated murder of John Hill during the aggravated burglary of the Hills' apartment) merged with the conviction of the petitioner for Count 11 (aggravated murder of John Hill during the aggravated robbery of Hill).

> or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or escape.
>
> * * *
>
> (F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Here, we find there is no evidence that defendant purposely, and with prior calculation and design, caused the death of John Hill (see former R.C. 2903.01[A]), nor is there evidence that defendant purposely caused the death of John Hill while committing or attempting to commit one of the enumerated crimes under former R.C. 2903.01(B).

Therefore, construing the evidence in favor of the prosecution, we must determine whether there is sufficient evidence that defendant aided and abetted the principal in the aggravated murder of John Hill. For defendant to have aided and abetted the principal in the aggravated murder of John Hill, the evidence must show that defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of aggravated murder and that defendant shared the criminal intent of the principal to commit aggravated murder.

* * *

In this case, defendant participated in the assault of Emmitt Grant during which a gun fell from the pants of one of Emmitt Grant's assailants and landed upon the floor of Grant's apartment. During the fight, Grant heard others in the background scream, "Get your gun, get your gun. * * * He's about to get your gun." Grant's hand was then kicked away from the gun that had hit the floor. Furthermore, Cortez Smith testified that he saw an unidentified person pick up a gun after it dropped to the floor.

Based upon this evidence, we find a trier of fact reasonably could infer that defendant was aware that someone in the group may have had a gun when defendant and his companions later committed crimes in the Hill brothers' apartment, which resulted in the shooting and death of John Hill. Furthermore, under these circumstances, we find a trier of fact reasonably could infer defendant acquiesced in the use of a gun.

Moreover, construing the evidence in favor of the prosecution, because the endangerment of John Hill's life began in the apartment courtyard wherein John Hill and his brother were accosted, and then in apparently short order the endangerment progressed to the Hill brothers' apartment where John Hill was murdered, we find that a trier of fact reasonably could find that the attack on the Hill brothers in their apartment, which resulted in the murder

> of John Hill, was a natural and probable consequence of the attack that had initially begun in the courtyard.
>
> Additionally, we find that, beyond a reasonable doubt, a trier of fact reasonably could conclude that defendant engaged in a common design with others to rob the Hill brothers by the use of force and violence, and that John Hill's murder was a natural and probable consequence given the force and violence used in the robbery, which created circumstances that in all probability would endanger human life.
>
> Accordingly, . . . we find sufficient evidence showing that defendant, through his participation in the crimes that occurred in the Hill brothers' apartment, supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of aggravated murder, and that defendant shared the criminal intent of the principal in the purposeful killing of John Hill.

State v. Brown, 2004 WL 1277498, at *13, 16 (citations and internal quotation marks omitted).

Brown's objections to the district court's denial of habeas relief on this ground are meritless. Although it is true that no evidence adduced at trial established that the petitioner personally *intended*, with prior calculation and design or even during the commission of another felony, to kill John Hill, demonstration of such an intent is not the only manner in which criminal liability for the murder may be imposed upon Brown. Indeed, evidence was before the triers of fact

that Brown and his cohorts engaged in an unprovoked attack upon both John and Jerramie Hill, an attack that escalated into a full-blown, strong-arm robbery. Given Brown's active participation in the physical beatings and home invasion, there is no question that had John Hill died as a result of a physical beating that was coordinated with Brown's beating of Jerramie Hill in furtherance of a robbery, the petitioner would be liable for aiding and abetting that death. The fact that the beating of John Hill escalated into a shooting death in no way exonerates the petitioner from complicity in the criminal deed, especially given the record evidence that Brown had to have been aware, at least since the beating of Emmitt Grant, that one of his companions – other than Cortez Smith – was in possession of a handgun.

The petitioner, and the dissenting judge on the Ohio Court of Appeals panel, insist that the Ohio case of *State v. Trocodaro*, 301 N.E.2d 898 (Ohio Ct. App. 1973), requires that Brown's aggravated murder conviction be overturned. In *Trocodaro*, the state court held that "unless one is in pursuance of a conspiracy previously formed, his involvement in an altercation which although connected with, is not the specific altercation occasioning, a homicide should not be held as a principal under the theory of aiding and abetting where he has neither *actually incited, nor encouraged the perpetrator of the homicide*." *Id.* at 902-03 (emphasis added).

Obviously, Brown believes that the appellate record contains no evidence that he did, in fact, incite or encourage at least one of his companions to engage in actions likely to lead to John Hill's death. The majority of the Ohio Court of Appeals panel that

reviewed the petitioner's convictions believed, however, that Brown was indeed guilty of such encouragement.

The petitioner did indicate in his statement to the police that he "was pretty heated too from that first previous fight (with Grant)," that his adrenaline was "still pumping," and that he was "ready to go." He also admitted that he was hitting Jerramie Hill, "hitting him, hitting him -- just I'm hitting him," and that his attack was so vicious that Hill lost consciousness and that Brown's hand became swollen. In light of such evidence, it is clearly possible that the fact-finders believed that Brown's agitated state incited other individuals with him to escalate the fury with which they also attacked the Hill brothers. Whether such is in fact the case is, again, beside the point in this habeas appeal. As long as we can conclude that the Ohio Court of Appeals was not unreasonable in determining that Brown was guilty of aggravated murder beyond a reasonable doubt, we must affirm the district court's decision denying habeas corpus relief.

Additionally, in an apparent effort to intimate that John Hill must have been murdered at some later time by some other individual, Brown also has emphasized throughout this prosecution that no gunshots were heard during the assaults on the Hills. Of course, such "negative evidence" is of little import in this case, because even though no one testified to hearing gunshots later that night, it is undeniable that John Hill was murdered by gunfire. Regardless of the presence or absence of such evidence, moreover, Brown's challenge to the district court's denial of habeas corpus relief on this claim must fail. As we held just last year in another Ohio habeas corpus

appeal challenging the sufficiency of the convicting evidence:

> Even if we were to conclude, after reviewing the record and drawing all inferences in favor of the prosecution, that [the petitioner's] convictions were not supported by sufficient evidence, the question would remain whether the Ohio Court of Appeals was unreasonable in concluding otherwise. "State court findings of fact are to be presumed correct unless the petitioner rebuts the presumption with clear and convincing evidence." *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002). A federal habeas court may not grant habeas relief "simply because that court concludes in its independent judgment that the state-court decision applied a Supreme Court case incorrectly." *Price v. Vincent*, 538 U.S. 634, 641 (2003) (internal brackets omitted). It must further conclude that the state-court decision was objectively unreasonable. *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

Saxton v. Sheets, 547 F.3d 597, 607 (6th Cir. 2008).

Regardless of how we, as individual jurists, would have viewed the evidence of Brown's guilt had we been called to evaluate the strength of the prosecution's case, we cannot escape the fact that the Ohio Court of Appeals was not unreasonable in choosing to put upon this case the gloss it did. As a result, we are compelled to conclude that the district court did not err in also denying habeas corpus relief to the petitioner on his challenge to the sufficiency of the evidence adduced to convict him of the aggravated murder (felony-murder) of John Hill.

D. *Gun Specification Convictions*

Brown also challenges the sufficiency of the evidence supporting his convictions for the various gun specifications charged in the indictment returned against him. The main thrust of this argument again appears to be a suggestion that we should view the evidence offered on the charges differently than did the Ohio Court of Appeals. We emphasize once more, however, that on habeas review, our task is not to reweigh or re-evaluate individual pieces of evidence but, rather, to determine only whether the state-court rulings on the merits of the issue were unreasonable.

Each of the 11 counts of the indictment against Brown contained specifications alleged in accordance with the provisions of sections 2941.141 and 2941.145 of the Ohio Revised Code. Pursuant to section 2941.141, a one-year prison term may be imposed upon a defendant if "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense." Section 2941.145 authorizes a three-year prison term for a defendant who "had a firearm on or about the offender's person or under the offender's control while committing the offense *and* displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." (Emphasis added.) Furthermore, the Ohio Supreme Court has recognized that the statutory firearm specifications may be applied to defendants even if those defendants were not themselves in actual control of the weapons. *See, e.g., State v. Powell*, 571 N.E.2d 125, 127 (Ohio 1991) (defendant "may be charged under [the statute] on the basis of the possession of a firearm by any accomplice involved" in the charged offense).

In addressing the propriety of the gun specifications found in this prosecution, we are again cognizant of our jurisprudential rule holding that issues not adequately developed or argued in the appellate briefs are deemed abandoned and thus not addressed by this court. *See, e.g., United States v. Hough*, 276 F.3d 884, 891 (6th Cir. 2002). Consequently, because Brown alludes to the gun specifications imposed upon convictions for offenses alleged in Counts 1, 4, 5, and 9 of the indictment in only the most perfunctory of manners, if at all, we choose not to disturb those judgments. Additionally, the charge of aggravated murder committed during an aggravated burglary (Count 10) merged, by operation of law, with the charge of aggravated murder committed during an aggravated robbery, as alleged in Count 11 of the indictment, and thus can result in no further punishment for the petitioner.

The Ohio Court of Appeals and the district court concluded that sufficient evidence existed in the record to support convictions for each gun specification on every count of the indictment against Brown. We disagree, however, with that blanket assertion and find some of those conclusions by the state court unsupported by any evidence and, therefore, unreasonable.

Aggravated Robbery of Emmitt Grant (Count 2)

As the rampage at the Beacon Hill Apartments began to unfold during the early morning hours of August 14, 2001, the petitioner and his cohorts engaged in a vicious assault upon Emmitt Grant in Grant's apartment. During that beating, a handgun fell out of the clothing of one of the attackers and

landed on the floor, before being kicked away out of Grant's reach and being retrieved and re-hidden by one of the attackers. Consequently, evidence in the record establishes that the petitioner was aware, at least at the time the gun fell to the floor, that one of his cohorts possessed a firearm. Because, as discussed in Section II.B. of this opinion, the Ohio Court of Appeals was not unreasonable in concluding that Brown was guilty of the aggravated robbery of Emmitt Grant by inflicting serious physical harm upon him during a theft offense, the state court was also not unreasonable in concluding that the petitioner could be held accountable for the possession of a firearm by one of his accomplices during that crime. *See* O.R.C. § 2941.141.

Moreover, the state court was not unreasonable in upholding the application of the section 2941.145 firearm specification to the conviction for the aggravated robbery of Grant. A legitimate argument could be advanced that the momentary, accidental viewing of the firearm in Grant's apartment when the gun fell to the floor does not constitute either "display" or "brandishing." It is equally plausible, however, that the victim's viewing of the weapon facilitated the offense by emphasizing to Grant the futility of resistance. Given our restrictive standard for reviewing the state court decision, we conclude that the district court did not err in denying habeas corpus relief on these grounds.

Attempted Murder of Emmitt Grant (Count 3)

The petitioner was aware of and was a willing participant in the brutal beating of Emmitt Grant that resulted in one of Brown's attempted murder

convictions. The attack on the victim continued after a handgun fell onto the floor, was kicked away from Grant, and was retrieved by another of Brown's companions. Clearly then, the petitioner was aware of the possession of a firearm by one of his accomplices and was properly held accountable for the section 2941.141 specification. Furthermore, although a legitimate argument could be proffered that a gun is neither "displayed" nor "brandished" when it merely falls accidentally to the floor and is immediately retrieved and rehidden, it is also far from unreasonable to believe that such a momentary exhibition of the weapon facilitated the offense by indicating to the victim the dangers inherent in resistance. Thus, the district court did not err in determining that the Ohio Court of Appeals was not unreasonable in applying both the section 2941.141 and the section 2941.145 firearm specifications to the petitioner for the Count 3 conviction.

Aggravated Robberies of Jerramie and John Hill; Attempted Murder of Jerramie Hill (Counts 6, 7, and 8)

Following the beating of Emmitt Grant, Brown and his companions broke into the Hills' apartment and assaulted and robbed the brothers. By that time, the petitioner was aware that someone in his group was in possession of the firearm that had fallen onto the floor in Grant's apartment. The state court's findings that the specifications of section 2941.141 (possession of a firearm) were applicable to the crimes of aggravated robbery of the brothers and the attempted murder of Jerramie Hill thus were not unreasonable.

Furthermore, because the state court was not unreasonable in surmising that the aggravated robbery and murder of John Hill occurred in relative temporal proximity, the application of the section 2941.145 specification for use of a firearm in the aggravated robbery of John Hill was proper. On the other hand, affirmance of the section 2941.145 specification for either displaying, brandishing, indicating possession of, or using the firearm to facilitate the offenses of aggravated robbery and attempted murder of *Jerramie* Hill would require us to engage in mere speculation. No evidence in the record indicates that a gun was actually used or even displayed in the perpetration of those two specific crimes. Consequently, the Ohio Court of Appeals decision to the contrary was necessarily unreasonable and the petitioner is entitled to relief on those bases.

Aggravated Murder of John Hill During an Aggravated Robbery (Count 11)

The Ohio Court of Appeals also affirmed the application of both the section 2941.141 and section 2941.145 firearm specifications to Brown's conviction for the aggravated murder of John Hill. Having concluded that the petitioner can be held accountable for John Hill's death, we do not find the state court's firearm determination to be unreasonable. Medical evidence offered at the petitioner's trial explained that John Hill died from multiple gunshot wounds. Logically, then, the principal in the actual murder of the victim not only possessed a firearm, but clearly brandished it in the commission of the offense. We thus affirm the district court's denial of habeas corpus relief on this ground.

E. *Motion to Alter or Amend the Judgment*

In a final appellate issue, Brown raises the somewhat scurrilous allegation that the district judge in this habeas matter adopted the report and recommendation of the magistrate judge without adequate review and consideration of the record. The petitioner bases his argument in this regard solely upon the fact that "only eight working days" passed between the filing of objections to the report and recommendation and the filing of the district court order adopting the magistrate judge's submission. According to Brown, because the transcript of the petitioner's trial was 661 pages long, the district judge could not have performed a detailed review of that transcript in such a compressed time period. Brown's appellate brief concedes, however, that 13 total days actually elapsed between the filing of his objections to the report and recommendation and the district court's order. Despite what Brown may think, federal judges do work on weekends and holidays, at night, and during lunch periods. Over the span of 13 days, and even over a mere eight days, a conscientious jurist could review 661 pages of transcript, digest objections offered by a lawyer to an adverse ruling, and issue a brief order adopting the magistrate judge's recommendation. The petitioner's challenge to the denial of his motion to alter or amend the judgment is thus patently without merit.

III. *CONCLUSION*

For the reasons discussed above, we AFFIRM in part and REVERSE in part the denial of petitioner Brown's habeas corpus petition. Specifically: as to Count 1 of the indictment (aggravated burglary of

Emmitt Grant), because Brown did not challenge the decision rendered regarding this conviction, we AFFIRM the denial of habeas relief on the conviction itself and on both firearm specifications; as to Count 2 of the indictment (aggravated robbery of Emmitt Grant), we AFFIRM the denial of habeas relief on the conviction and on both firearm specifications; as to Count 3 of the indictment (attempted murder of Emmitt Grant), we AFFIRM the denial of habeas relief on the conviction and on both firearm specifications; as to Count 4 of the indictment (felonious assault of Emmitt Grant), because Brown did not challenge the decision rendered regarding this conviction, we AFFIRM the denial of habeas relief on the conviction itself as well as on both firearm specifications; as to Count 5 of the indictment (aggravated burglary of the Hill brothers), again because the petitioner failed to challenge properly the district court decision regarding this conviction, we AFFIRM the denial of habeas relief on the conviction and on both firearm specifications; as to Count 6 of the indictment (aggravated robbery of Jerramie Hill), we AFFIRM the denial of habeas relief on the aggravated robbery conviction and on the section 2941.141 specification, but REVERSE the denial of habeas relief on the section 2941.145 specification; as to Count 7 of the indictment (aggravated robbery of John Hill), we AFFIRM the denial of habeas relief on the conviction and on both firearm specifications; as to Count 8 of the indictment (attempted murder of Jerramie Hill), we AFFIRM the denial of habeas relief on the actual conviction and on the section 2941.141 specification, but REVERSE the denial of habeas relief on the section 2941.145 specification; as to Count 9 of the indictment (felonious assault on Jerramie Hill), because Brown failed to challenge properly the district court determination, we

AFFIRM the denial of habeas relief on the substantive conviction and on both firearm specifications; as to Count 10 of the indictment (aggravated murder of John Hill during an aggravated burglary), we acknowledge that any conviction under this count necessarily merged with the conviction for the aggravated murder of John Hill alleged in Count 11; and, as to Count 11 of the indictment (aggravated murder of John Hill during an aggravated robbery), we AFFIRM the denial of habeas relief on the conviction itself and on both firearm specifications.

We also AFFIRM the district court's denial of the petitioner's motion to alter or amend the judgment and REMAND this matter to the district court for entry of an order consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-4037; 06-4043

[Filed June 2, 2009]

GERALD L. BROWN, Petitioner-Appellant,	)
v.	)
KHELLEH KONTEH, Warden, Respondent-Appellee.	)

Before: DAUGHTREY, GILMAN, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's ruling is AFFIRMED IN PART, REVERSED IN PART, and the case is REMANDED for entry of such orders as are appropriate and necessary to comply with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. 2:05-cv-540
Judge Holschuh
Magistrate Judge King

[Filed June 28, 2006]

GERALD L. BROWN, JR.,	)
	)
Petitioner,	)
	)
v.	)
	)
KHELLEH KONTEH, Warden,	)
	)
Respondent.	)
	)

Memorandum Opinion and Order

On May 16, 2006, final judgment was entered dismissing Petitioner's habeas corpus petition pursuant to 28 U.S.C. §2254. (Doc. ## 24, 25). This matter is now before the Court on Petitioner's May 24, 2006, motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), (Doc. # 26), and his request for an in-chambers conference. (Doc. # 27).

I. Motion to Alter or Amend Judgment

As an initial matter, the Court must determine whether it has jurisdiction to resolve Petitioner's Rule 59(e) motion to alter or amend judgment. It is well established that "the Federal Rules of Civil Procedure 'do not extend or limit federal jurisdiction, but they implement the exercise of existing jurisdiction, which has been conferred by statute.'" Post v. Bradshaw, 422 F.3d 419, 423-24 (6th Cir. 2005) (quoting Edwards v. E.I. Du Pont De Nemours & Co., 183 F.2d 165, 168 (6th Cir. 1950)). Thus, as explained by the Supreme Court, if a motion filed pursuant to the Federal Rules of Civil Procedure is properly construed as a second or successive petition for habeas corpus under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2244(b), the Court will be without jurisdiction to resolve that motion.[1] Gonzalez v. Crosby, 125 S. Ct. 2641, 2647-48 (2005). See also Post, 422 F.3d at 424.

The first step in determining whether Petitioner's Rule 59(e) motion is actually a second or successive petition is to determine whether the motion presents a "claim" for habeas relief. Gonzalez, 125 S. Ct. at 2647. The Supreme Court has explained that a "claim," as used in § 2244(b), is an asserted federal basis for relief from a state court's judgment of conviction. Id. "A motion can ... be said to bring a 'claim' if it attacks the federal court's previous

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[1] 28 U.S.C. §2244(b)(3)(A) states that before a second or successive petition for writ of habeas corpus can be filed in the district court, the applicant shall move in the appropriate circuit court of appeals for an order authorizing the district court to consider the application.

resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." Id. at 2648 (emphasis original). However, when a motion challenges "some defect in the integrity of the federal habeas proceedings," the motion will not be considered a second or successive petition. Id.

In his motion to alter or amend judgment, Petitioner suggests that the Court did not adequately review the record prior to adopting and affirming the Report and Recommendation. Specifically, Petitioner argues that

> the District Court may not have had a suitable period of time to delineate the reasons in support of its conclusion, prior to the issuing of the Judgement [sic], Opinion and Order, thereby causing it to err in overruling Petitioner's objections and to adopt and affirm the Magistrate-Judge's Report and Recommendation.

(Motion to Alter or Amend Judgment, at p. 2). Petitioner's argument does not provide a federal basis for relief from the state court's judgment of conviction. Instead, Petitioner's motion is, in essence, a challenge to the Court's ability to review Petitioner's objections to the Report and Recommendation within the time period prior to the judgment dismissing Petitioner's habeas corpus petition. Like the motion addressed in Gonzalez, Petitioner's motion in this case "confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas

proceeding." Gonzalez, 125 S. Ct. at 2649. Thus, this Court cannot conclude that Petitioner's motion constitutes a second or successive habeas petition under §2244(b). Therefore, this Court has jurisdiction to consider Petitioner's Rule 59(e) motion.

The grant or denial of a Rule 59(e) motion is within the informed discretion of the Court. See Huff v. Metropolitan Life Ins. Co., 675 F.2d 119, 122 (6th Cir. 1982). A motion to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. GenCorp, Inc. v. American Intern. Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)(internal citations omitted). However, a motion to alter or amend a judgment is an extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources. American Textile Mfrs. Institute, Inc. v. The Limited, Inc., 179 F.R.D. 541, 547 (S.D. Ohio 1997).

Petitioner does not contend that there has been an intervening change in controlling law or that there is any newly discovered evidence. Instead, as was noted *supra*, Petitioner contends that this Court "may not have had a suitable period of time to delineate the reasons in support of its conclusion ... [to] affirm the Magistrate-Judge's Report and Recommendation." (Motion to Alter or Amend Judgment at p. 2).

This Court recognizes that 28 U.S.C. § 636(b)(1) requires a *de novo* review of the Magistrate Judge's Report and Recommendation. However, contrary to Petitioner's contention, the Court did have a suitable period of time to review the record, and any inference

that the Court did not comply with the requirement of 28 U.S.C. § 636(b)(1) is completely unfounded. This Court did in fact engage in *de novo* review of the Magistrate Judge's Report and Recommendation.

Petitioner also appears to continue to argue that there was no evidence to establish his intent to rob or kill, and that the evidence submitted established solely his presence at the scene. Under Gonzalez, the Court lacks jurisdiction to resolve this challenge to the Court's previous resolution of Petitioner's habeas claim on the merits. However, even assuming that the Court does not lack jurisdiction over such a challenge, this Court remains unpersuaded that Petitioner has rebutted the presumption of correctness to which the state courts are entitled.[2] 28 U.S.C. §2254(d), (e); Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510, 520 (2003). Petitioner has presented no reason to justify altering this Court's conclusion that the state court's decision dismissing his sufficiency of the evidence claim under Jackson v. Virginia, 443 U.S. 307 (1979), is contrary to or an unreasonable application of federal law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. §2254(d), (e).

II. Motion for In-Chambers Conference

In his motion for in-chambers conference with the District Judge, Petitioner states that he wishes to "further articulate the reasons for his... motion for

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[2] The Court recognizes that Petitioner disputes both the factual findings and the conclusions of the state appellate court.

reconsideration and better draw the Court's attention to gaps in the record that support granting petitioner's writ on sufficiency grounds." (Motion for in Chamber's Conference). Any arguments in support of Defendant's motion should have been made in the memorandum supporting the motion and not in a personal conference with the District Judge. Defendant's motion is therefore **DENIED**.

WHEREUPON, Petitioner's motion to alter or amend judgment (Doc. # 26) is **DENIED**. Further, Petitioner's motion for an in-chambers conference (Doc. # 27) is **DENIED**.

IT IS SO ORDERED.

June 28, 2006

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:05-CV-540
JUDGE HOLSCHUH
MAGISTRATE JUDGE KING

[Filed May 16, 2006]

GERALD L. BROWN, JR.,	)
	)
Petitioner,	)
	)
v.	)
	)
KHELLEH KONTEH, Warden,	)
	)
Respondent.	)
	)

OPINION AND ORDER

On February 22, 2006, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation* and also requests oral arguments or a conference with the law clerk.

Petitioner objects to all of the Magistrate Judge's recommendations and raises all of the same arguments that were previously presented and considered by the Magistrate Judge. Petitioner specifically disputes the factual findings of the state appellate court and he again argues that the state appellate court's decision constitutes an unreasonable determination of the facts and impermissible "stacking of inferences." *Objections*, at 5. Petitioner again argues that the evidence fails to establish that petitioner knew that items were being stolen until after Grant and the Hill brothers had been beaten (and John Hill subsequently killed); he also argues that the evidence fails to establish that he knew that one of his cohorts was carrying a gun, that the evidence fails to establish intent on his part to commit any of the crimes in dispute and that the evidence reflects only his mere presence at the scene.

Petitioner's arguments are not well taken. This Court has reviewed the entire record, including the trial transcript and petitioner's traverse. Unlike the cases referred to by petitioner *(i.e., Barnes v. Hofbauer*, unreported, 2005 WL 1529591 (E.D. Mich., June 22, 2005); *Fuller v. Anderson*, 662 F.2d 420 424 (6th Cir. 1981); and *Speigner v. Jago*, 603 F.2d 1208, 1216 (6th Cir. 1979)), *see also Brown v. Palmer*, 441 F.3d 347 (6th Cir. 2006), which stand for the proposition that a defendant's mere presence at the scene of the crime is insufficient to establish guilt as an aider and abettor, here, when viewing all of the evidence in the light most favorable to the prosecution, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and for the reasons discussed at length by the state appellate court and in the Magistrate Judge's *Report and Recommendation,* this Court likewise concludes that the evidence is

constitutionally sufficient to sustain petitioner's convictions.

Petitioner's objections are **OVERRULED**. His request for oral argument or a conference with the law clerk is **DENIED.** The *Report and Recommendation* is **ADOPTED** and **AFFIRMED.**

This action is hereby **DISMISSED.**

IT IS SO ORDERED.

May 16, 2006

/s/ John D. Holschuh
JOHN D. HOLSCHUH
United States District Judge

** AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case Number 2:05-cv-540
Judge Holschuh
Magistrate Judge King

[Filed May 16, 2006]

Gerald L. Brown, Jr.,	)
	)
vs.	)
	)
Khelleh Konteh, Warden,	)
	)

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED That pursuant to the May 16, 2006 Opinion and Order, this action is Dismissed.

Date: **May 16, 2006** **James Bonini, Clerk**

/s/ Sherry Nichols
Sherry Nichols/Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-4037/4043

[Filed August 7, 2009]

GERALD BROWN,
Petitioner-Appellant,

v.

KHELLEH KONTEH, WARDEN,
Respondent-Appellee.

ORDER

BEFORE: DAUGHTREY, GILMAN, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk